Ricky Thong Yew Fook v OCBC Bank (M) Bhd

HIGH COURT (PULAU PINANG) — ORIGINATING SUMMONS NO 24–552 OF 2002
KAMALANATHAN RATNAM J
26 MARCH 2003

Companies and Corporations *— Charges — Registration — Charge by charge of fixed deposit — Failure to register charge pursuant to s 108(3)(k) of the Companies Act 1965 — Whether charge over fixed deposit by company was void against liquidator*

The defendant had granted various banking facilities to Zanshin Plastic Industrial Sdn Bhd (in liquidation) ('the company'), which were secured by, inter alia, three debentures created on 19 August 1996, 27 December 1996 and 23 June 1997 ('the debentures'). By a letter of offer dated 5 April 1997 ('the letter of offer'), the defendant had offered further banking facilities to the company, which were secured by a pledge of fixed deposit of RM500,000 ('the fixed deposit'). Thereafter, the company's directors appointed the plaintiff as the provisional liquidator for the period 11 June 1998 to 7 July 1998. The plaintiff's appointment as the liquidator was duly confirmed by the court with effect from 7 July 1998. Meanwhile, voluntary winding up of the company commenced on 11 June 1998 and two persons were appointed by the defendant on 13 June 1998, as the receivers and managers under the terms of the debentures. This was the plaintiff's application for, inter alia, a declaration that the charge over the fixed deposit by the company to the defendant was void against the plaintiff, for want of registration under s 108(3)(k) of the Companies Act 1965 ('the Act').

Held, allowing the plaintiff's application:

(1) By virtue of s 111 of the Act, the registrar will issue a certificate of every registration of charge (in the prescribed Form 40 of the Act) and the said certificate shall be conclusive evidence that the requirements as to registration had been complied with. In the instant case, the Form 40 exhibited by the defendant did not reflect the fixed deposit to comply with the requirement of s 108(3)(k) of the Act. On the contrary, the charge reflected the existence of a debenture and not the fixed deposit. Therefore, the charge over the fixed deposit had not been registered under s 108(3)(k) of the Act and was therefore void as against the liquidator (see pp 389F–G, 390C–D).

(2) Section 108(3)(k) of the Act obliged the defendant to create a charge on the credit balance of the company in any deposit account and a fixed deposit account clearly fell within this category (see p 390E).

(3) In any event, the defendant's upliftment of the fixed deposit was caught by the winding up proceedings because the voluntary winding up had commenced at the time the defendant uplifted the

fixed deposit. This was because based on s 255(6)(a) of the Act, the voluntary winding up commenced when the statutory declaration (in the prescribed Form 65A of the Act) was lodged with the registrar and in the instant case, Form 65A of the Act was lodged with the registrar on 11 June 2002 but the defendant only uplifted the fixed deposit on 13 June 1998 (see p 390F–H); *Arab Malaysian Merchant Bank Bhd v Orient Apparel Bhd & Ors* [2002] 1 MLJ 89 followed; *Asia Commercial Finance (M) Bhd v JB Precision Moulding Industries Sdn Bhd (In liquidation)* [1996] 2 MLJ 1 referred; *Sime Diamond Leasing (M) Sdn Bhd v JB Precision Moulding Industries Sdn Bhd (in liquidation)* [1998] 4 MLJ 569 distinguished.

[Bahasa Malaysia summary

Defendan telah memberikan beberapa kemudahan perbankan kepada Zanshin Plastic Industrial Sdn Bhd (dalam penyelesaian) ('syarikat tersebut'), yang dicagarkan dengan sandaran, antara lain, tiga debentur yang telah dibentuk pada 19 Ogos 1996, 27 Disember 1996 dan 23 Jun 1997 ('debentur-debentur tersebut'). Melalui sepucuk surat tawaran bertarikh 5 April 1997 ('surat tawaran tersebut'), defendan telah menawarkan kemudahan perbankan lain kepada syarikat tersebut, yang dicagarkan dengan satu sandaran simpanan tetap berjumlah RM500,000 ('simpanan tetap tersebut'). Berikutan itu, pengarah-pengarah syarikat tersebut telah melantik plaintif sebagai penyelesai sementara untuk tempoh daripada 11 Jun 1998 hingga 7 Julai 1998. Perlantikan plaintif sebagai penyelesai telah disahkan sewajarnya oleh mahkamah berkuatkuasa daripada 7 Julai 1998. Sementara itu, penggulungan sukarela syarikat tersebut telah dimulakan pada 11 Jun 1998 dan dua orang telah dilantik oleh defendan pada 13 Jun 1998, sebagai penerima-penerima dan pengurus-pengurus di bawah terma-terma debentur tersebut. Ini adalah permohonan plaintif untuk, antara lain, satu deklarasi bahawa gadaian ke atas simpanan tetap oleh syarikat tersebut kepada defendan adalah tidak sah terhadap plaintif, kerana tidak didaftarkan di bawah s 108(3)(k) Akta Syarikat 1965 ('Akta tersebut').

Diputuskan, membenarkan permohonan plaintif:

(1) Menurut s 111 Akta tersebut, pendaftar akan mengeluarkan satu sijil untuk semua pendaftaran gadaian (dalam Borang 40 yang ditetapkan dalam Akta tersebut) dan sijil tersebut adalah keterangan konklusif bahawa keperluan berhubung pendaftaran telah dipatuhi. Dalam kes semasa, Borang 40 yang telah diekshibitkan oleh defendan tidak menggambarkan simpanan tetap tersebut untuk mematuhi keperluan s 108(3)(k) Akta tersebut. Sebaliknya, gadaian tersebut menggambarkan kewujudan satu debentur dan bukan simpanan tetap. Oleh itu, gadaian ke atas simpanan tetap tidak didaftarkan di bawah

s 108(3)(k) Akta tersebut dan oleh itu adalah tidak sah terhadap penyelesai (lihat ms 389F–G, 390C–D).

(2) Seksyen 108(3)(k) Akta tersebut memerlukan defendan mengenakan gadaian ke atas baki kredit syarikat tersebut dalam mana-mana akaun simpanan dan suatu akaun simpanan tetap adalah termasuk di dalam kategori ini (lihat ms 390E).

(3) Dalam apa keadaan, penambahan simpanan tetap defendan telah terhalang oleh prosiding penggulungan kerana penggulungan sukarela tersebut telah bermula pada masa defendan telah menambahkan simpanan tetap tersebut. Ini adalah kerana berdasarkan s 255(6)(a) Akta tersebut, penggulungan sukarela tersebut telah bermula apabila deklarasi statutori (dalam Borang 65A yang ditetapkan dalam Akta tersebut) telah dibuat kepada pendaftar dan dalam kes semasa, Borang 65A Akta tersebut telah dibuat kepada pendaftar pada 11 Jun 2002 tetapi defendan hanya menambahkan simpanan tetap tersebut pada 13 Jun 1998 (lihat ms 390F–H); *Arab Malaysian Merchant Bank Bhd v Orient Apparel Bhd & Ors* [2002] 1 MLJ 89 diikut; *Asia Commercial Finance (M) Bhd v JB Precision Moulding Industries Sdn Bhd (In liquidation)* [1996] 2 MLJ 1 dirujuk; *Sime Diamond Leasing (M) Sdn Bhd v JB Precision Moulding Industries Sdn Bhd (in liquidation)* [1998] 4 MLJ 569 dibeza.]

Notes

For cases on registration of charges, see 3 *Mallal's Digest* (4th Ed, 2000 Reissue) paras 74–82.

Cases referred to

Arab Malaysian Merchant Bank Bhd v Orient Apparel Bhd & Ors [2002] 1 MLJ 89 (folld)

Asia Commercial Finance (M) Bhd v JB Precision Moulding Industries Sdn Bhd (In liquidation) [1996] 2 MLJ 1 (refd)

Sime Diamond Leasing (M) Sdn Bhd v JB Precision Moulding Industries Sdn Bhd (In liquidation) [1998] 4 MLJ 569 (distd)

Legislation referred to

Bankruptcy Act 1967 ss 41(1), 53(1)

Companies Act 1965 ss 108(1), (3)(a–k), 111, 223, 255(6), 291(2), 293, Forms 40, 65A

Kaushalya Rajathurai (*Cheang & Ariff*) for the plaintiff.
KK Chan (*Shook Lin & Bok*) for the defendant.

Kamalanathan Ratnam J: The plaintiff was appointed by the directors of Zanshin Plastic Industrial Sdn Bhd (in liquidation) ('the company') as the provisional liquidator for the period 11 June 1998 to 7 July 1998. Subsequently, by a court order dated 27 August 1998, the plaintiff was duly

confirmed the liquidator effective from 7 July 1998. The defendant had given various financial facilities to the company including a facility agreement dated 15 July 1996 and three debentures dated 19 August 1996, 27 December 1996 and 23 June 1997 ('the debentures'). The company had also accepted a letter of offer dated 5 April 1997 for further additional credit facilities from the defendant. In the meantime, voluntary winding up of the company commenced on 11 June 1998 and two persons were appointed by the defendant on 13 June 1998 as the receivers and managers under the terms of the debentures.

By the letter of offer dated 5 April 1997, the defendant had offered further credit facilities to the company to be secured among others by a pledge of RM500,000 by way of a fixed deposit. On 8 April 1997, two directors' circular resolutions pursuant art 90 of the company's articles of association were passed to accept the defendant's letter of offer dated 5 April 1997 and to place funds in a fixed deposit with the defendant for RM500,000. Together with the directors' circular resolutions, the company had also forwarded to the defendant the letter of set-off duly executed by the company.

The plaintiff's case

It is the plaintiff's case that the defendant did not exercise the right to set-off prior to the voluntary winding up of the company. The plaintiff further contends that although the fixed deposit had become an asset charged to the defendant under the terms of the debentures, however, the defendant had failed to register the fixed deposit as a charge pursuant to s 108(3)(k) of the Companies Act 1965 ('the CA').

The plaintiff therefore prayed for:

(a) a declaration that the charge consisting of a pledge of a Fixed Deposit Certificate No 731–314184–0 in the amount of RM500,000 by the company to the defendant is void against the liquidator, the plaintiff, for want of registration under s 108(3)(k) of the CA.

(b) consequently, for a declaration that the RM500,000 held under Fixed Deposit Certificate No 731–314184–0 be handed over to the plaintiff, the liquidator for the company.

(c) alternatively for a declaration that in the event the RM500,000 fixed deposit held under Certificate No 731–314184–0 has been liquidated by the defendant, that the charge to the defendant is void against the liquidator of the company, the plaintiff, for want of registration under s 108(3)(k) of the CA.

(d) and consequently for a declaration that the defendant duly pays to the plaintiff, the liquidator for the company the sum of RM500,000 within 21 days from the date of the order of this court.

(e) interest at the rate of 9.2%pa from date of liquidation to full settlement.

(f) costs of these proceedings.

Findings of the court

It is pertinent, for the purposes of considering the plaintiff's arguments to reproduce s 108(1) and (3)(a–k) of the CA which read as follows:

> 108 Registration of charges
>
> (1) Subject to this Division where a charge to which this section applies is created by a company, there shall be lodged with the Registrar for registration within thirty days after the creation of the charge a statement of the prescribed particulars, and if this section is not complied with in relation to the charge, the charge shall, so far as any security on the company's property or undertaking is thereby conferred, be void against the liquidator and any creditor of the company.
>
> (2) ...
>
> (3) The charges to which this section applies are —
>
> (a) a charge to secure any issue of debentures;
>
> (b) a charge on uncalled share capital of a company;
>
> (c) a charge on shares of a subsidiary of the company which are owned by the company;
>
> (d) a charge or an assignment created or evidenced by an instrument which if executed by an individual within West Malaysia and affecting property within West Malaysia would be invalid or of limited effect if not filed or registered under the Bills of Sale Act 1950;
>
> (e) a charge on land wherever situate or any interest therein;
>
> (f) a charge on book debts of the company;
>
> (g) a floating charge on the undertaking or property of a company;
>
> (h) a charge on calls made but not paid;
>
> (i) a charge on a ship or aircraft or any share in a ship or aircraft;
>
> (j) a charge on goodwill, on a patent or licence under a patent, on a trade mark, or on a copyright or a licence under a copyright; and
>
> (k) a charge on the credit balance of the company in any deposit account.

By virtue of s 111 of the CA, the registrar must keep a register of all the charges lodged for registration and will issue a certificate of every registration and the said certificate shall be conclusive evidence that the requirements as to registration have been complied with. The said certificate to be issued by the registrar is in the prescribed Form 40 of the CA.

In this case, the Form 40 exhibited by the defendant is reproduced and it reads as follows:

> PEJABAT PENDAFTAR SYARIKAT
> (Registry of Companies)
> MALAYSIA
>
> BORANG 40
> AKTA SYARIKAT 1965
> [Seksyen 111(2)]
>
> No Syarikat
>
> | 358474 | H |
> |---|---|

PERAKUAN PENDAFTARAN GADAIAN

Adalah diperakui bahawa suatu gadaian bertarikh 23 haribulan Jun 1997 yang diwujudkan oleh ZANSHIN PLASTIC INDUSTRIAL SDN BHD yang memihak kepada

OCBC BANK (MALAYSIA) BHD,

bagi menjamin amaun yang dinyatakan dalam Pernyataan Butir-Butir yang Ditetapkan berkenaan dengan gadaian yang bertarikh 23 haribulan Jun 1997 telah didaftarkan dan dinomborkan 013 dalam Daftar Gadaian.

Diberikan di bawah tandatangan dan meterai saya, di Butterworth pada 5 haribulan Ogos 1997.

(tt)

SITI RASIDA BT ABDULLAH

PENOLONG PENDAFTAR SYARIKAT

MALAYSIA

[Borang ini diterjemahkan oleh Peguam Negara, Malaysia, menurut Pemberitahu Undangan No 12 tahun 1964: PN(SBK)23 Pt 11, PS 7/81 Jld 2]

It is clear that the charge as exhibited does not reflect the fixed deposit of RM500,000 to comply with the requirement of s 108(3)(k) of the CA. On the contrary, the charge reflects the existence of a debenture and this is in compliance with s 108(3)(a) of the CA. But what is in issue is the fixed deposit not the debenture. In the circumstances, it is my judgment that the charge which has not been registered under s 108(3)(k) of the CA to reflect the fixed deposit, is void as against the liquidator.

The defendant however argues that there is no requirement in law to register the fixed deposit. Section 108(3)(k) of the CA obliges the defendant to create a charge on the credit balance of the company in any deposit account and to my mind a fixed deposit account clearly falls into this category.

The defendant argued that since it had uplifted the fixed deposit on 13 June 1998 and had credited the amount thereunder into the company's account with the defendant, and since the defendant was only notified by a letter dated 13 June 1998 and received by the defendant on 16 June 1998 from the plaintiff that the company was no longer able to continue business so that a provisional liquidator could be appointed pursuant to the company's winding up proceedings and since winding up only commences upon the lodgment of the statutory declaration with the registrar and since the defendant did not know when this had occurred, the defendant's upliftment of the fixed deposit was not caught by the winding up proceedings.

I am unable to agree with this. When the defendant uplifted the fixed deposit on 13 June 1998, I note from the Form 65A lodged with the registrar pursuant to s 255(6) of the CA that the same was lodged on 11 June 2002. The said s 255(6) of the CA reads as follows:

A voluntary winding up shall commence —

(a) where a provisional liquidator has been appointed before the resolution for voluntary winding up was passed, at the time when the declaration referred to in sub-s (1) was lodged with the Registrar; and

(b) in any other case, at the time of the passing of the resolution for voluntary winding up.

A In any case, I note that counsel for the defendant did not press this issue in his submission.

It is pertinent to refer to the Federal Court decision in *Asia Commercial Finance (M) Bhd v JB Precision Moulding Industries Sdn Bhd (In liquidation)* [1996] 2 MLJ 1 at p 7 wherein Chong Siew Fai CJ (Sabah and Sarawak) B speaking obiter had this to say:

> The point as to the requirement of registering the 'memorandum of security deposit' under s 108 of the Companies Act 1965 was not raised before us. In any event, we agree with the learned trial judge that the said memorandum which was dated 16 August 1988 need not be so registered since sub-para (k) of s 108(3) that applied to a document in the nature of the said memorandum C did not come into effect until 25 September 1993 while the other sub-paras of the said s 108(3) in force at the material time on 16 August 1988 had no application. Accordingly, we accept that the said memorandum is not void by reason of non-registration under s 108(1) of the Companies Act 1965.

In other words because the memorandum of security deposit for RM26,691 D in the *Asia Commercial Finance (M) Bhd* was dated 16 August 1988 which was long before the amendment to s 108(3) which included the new paragraph (k), the said deposit was held not void by reason of the non-registration under s 108(1) of the CA. This case is clearly in conflict with the defendant's argument that a fixed deposit account need not be registered as a charge.

E In *Arab Malaysian Merchant Bank Bhd v Orient Apparel Bhd & Ors* [2002] 1 MLJ 89 in respect of the applicability of s 108(3)(k) this is what James Foong J said at p 101:

> Whether the FD needed to be registered under s 108(3)(k) of the Act is a point I have already decided in the case of *Bensa Sdn Bhd (in liquidation) v* F *Malayan Banking Bhd & Anor* [1993] 1 MLJ 119. As explained, these FDs were only evidence of acceptance of deposits of Seow Chee Hong by the bank. It was only when they were used as securities that they fell within the category of 'a charge on the credit balance of the company in any deposit account' as described in s 108(3)(k) of the Act. Thus, standing by itself these FDs were not caught under s 108(3)(k) of the Act, but the pledging of these as securities G were.
>
> When such collateral was not registered, they are void against the liquidator — s 108(1) of the Act. This statutory enactment must, in my view, overrides the bank's right to a lien under common law over these securities. It consequently, as argued, the bank's common law right to a set-off cannot be maintained for having no basis to rely on.

H The defendant raised a new issue. Mr Chan contended that the issue of registration under s 108(1) of the CA was a red herring. He contended that since the company was insolvent the law of bankruptcy applies pursuant to s 291(2) of the CA. The said section reads as follows:

> I Subject to s 292, in the winding up of an insolvent company the same rules shall prevail and be observed with regard to the respective rights of secured and unsecured creditors and debts provable and the valuation of annuities and future and contingent liabilities as are in force for the time being under the law

relating to bankruptcy in relation to the estates of bankrupt persons, and all persons who in any such case would be entitled to prove for and receive dividends out of the assets of the company may come in under the winding up and make such claims against the company as they respectively are entitled to by virtue of this section.

(Section 292 of the CA deals with the priority of payment of all unsecured debts).

Mr Chan also referred me to s 41(1) of the Bankruptcy Act 1967 ('the BA') which reads as follows:

Mutual credit and set-off

Where there have been mutual credits, mutual debts, or other mutual dealings between a debtor against whom a receiving order is made under this Act and any other person proving or claiming to prove a debt under such order, an account shall be taken of what is due from the one party to the other in respect of such mutual dealings, and the sum due from the one party shall be set-off against any sum due from the other party, and the balance of the account and no more shall be claimed or paid on either side respectively.

Linking these two sections, the defendant referred me to another Federal Court decision, namely *Sime Diamond Leasing (M) Sdn Bhd v JB Precision Moulding Industries Sdn Bhd (In liquidation)* [1998] 4 MLJ 569.

The facts of that case were as follows:

The appellant ('the lessor') had entered into an equipment lease agreement dated 30 December 1988 (the agreement') whereby it had leased to the respondent ('the lessee.') one unit of a plastic injection moulding machine. Pursuant to the agreement, the lessee had deposited with the lessor a prepaid rent of RM3,958 and a sum of RM64,500 as security for the due performance of the agreement ('the deposits'). Payment of the deposits was evidenced by a memorandum dated 30 December 1988. Clause 14.1(g)(ii) of the agreement provided, inter alia, that in the event of a winding up petition being presented against the lessee, the lessor shall be entitled by written notice to determine and end the lease and to retake possession of the equipment. On 27 March 1990, the lessor gave notice of termination of the agreement on the ground that the presentation of the winding up petition constitutes a breach of the agreement and, at the same time, demanding payment of the amount outstanding after setting off the deposits pursuant to cl 4.3 of the agreement. On 4 April 1990, the lessee was wound up and a liquidator appointed. The liquidator demanded from the lessor the return of the deposits but the lessor refused to comply.

The lessee's case was that upon presentation of the petition, the claim in respect of the deposits had been reduced to a right of proof and that any other method of claiming the deposits would be barred by the *pari passu* principle of distribution. Furthermore, to give the lessor the right of set-off would, in effect, give it an undue preference, over the general body of creditors, contrary to s 293 of the CA, read together with s 53(1) of the BA, and so the provisions of the agreement which purport to give the right of set-off should be struck down as being in violation of those provisions, and, therefore, void.

A The liquidator succeed both in the High Court and in the Court of Appeal. At the Federal Court, two issues were raised:

(i) whether the set-off pursuant to cl 4.3 of the agreement was a voidable preference under ss 223 and 293 of the CA, read together with s 53(1) of the BA; and

B (ii) if 'no', then whether, the set-off pursuant to the agreement was authorized by s 41 of the BA, which is made applicable to insolvent companies by s 291 of the CA.

In his judgment Edgar Joseph Jr FCJ said at p 581 as follows:

> C ... it is clear law that upon the advent of bankruptcy or liquidation, the rights of contractual set-off are displaced by statutory provisions relating to set-off on insolvency. The applicable legislation relating to set-off on company winding up is to be found in the statutory provisions governing set-off on bankruptcy. To put it another way, the statutory provisions governing bankruptcy set-off are incorporated by reference into the provisions relating to company winding up; specifically, ss 40 and 41 of the Bankruptcy Act, are D incorporated by reference to companies by virtue of s 291(2) of the Companies Act. Section 41 of the Bankruptcy Act is, of course, the section which obliges a creditor who engages in mutual dealings with the company and is also its debtor, to set-off the debts and prove only for the balance.

His Lordship continued:

> E It is important to note that the case of *Re Kim San Engineers Pte Ltd* [1992] 2 SLR 749 shows — and we agree — that where s 41 applies, payments which would otherwise be set aside under s 293 of the Companies Act may yet be retained by the creditor. We hasten to add we do not overlook the case of *JB Precision Moulding Industries Sdn Bhd (in liquidation) v Asia Commercial Finance (M) Sdn Bhd* [1994] 1 MLJ 734 where the High Court refused to allow a set-off, but with respect this case should be regarded as having been decided F per incuriam as no reference was made therein to s 41 of the Bankruptcy Act.

With the greatest respect, I do not see how this case can help. The very section that had been specifically included in the CA, namely, s 108(3)(k) of the CA has not been considered in *Sime Diamond.* The Federal Court case of *Sime Diamond* was heard on 7 November 1998 and reported in G 1998. The case of *JB Precision* that the Federal Court in *Sime Diamond* referred to in its judgment was the decision of the High Court. The Federal Court's decision which was the appeal from decision of the High Court and which I have referred to earlier, was reported in 1996. It is regrettable that counsel had failed to refer to the views expressed obiter by Chong Siew Fai CJ (Sabah and Sarawak) in respect of s 108(3)(k) of the Act in that case. H Further, since the Federal Court in *Sime Diamond* did not discuss s 108(3)(k) in its judgment I decline to follow this decision. I am of the view that the defendant is obliged to register the charge of the fixed deposit pursuant to s 108(3)(k) of the CA and since this was not done I grant the plaintiff an order in terms of prayers (a)–(f).

I *Plaintiff's application allowed.*